

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dennis E. Hecker,

Debtor.

BKY No. 09-50779
Chapter 7

TRUSTEE'S REPLY MEMORANDUM

INTRODUCTION

Randall L. Seaver, the Chapter 7 Trustee of the above-referenced bankruptcy estate ("Trustee"), has requested to authority to conduct Bankruptcy Rule 2004 discovery of James Gustafson ("Gustafson"). One reason that the Trustee desires to examine Gustafson is that he is known to have paid personal obligations of the Debtor after the commencement of this case. An example is attached as Exhibit A.

On or about March 3, 2010, Mr. Gustafson mailed an objection to the Trustee's motion arguing that granting the motion "would necessarily jeopardize" Gustafson's "right against self-incrimination." The Trustee disagrees that this would be the case (as has the Court in related matters such as *Chrysler Financial Services Americas, LLC. v. Dennis E. Hecker*, Adv. No. 09-5019).

ARGUMENT

The Fifth Amendment provides: "No person shall be ... compelled in any criminal case to be a witness against himself..." U.S. Const. amend. V. "The core protection afforded by the Fifth Amendment is a prohibition on compelling a criminal defendant to testify against himself at trial." *U.S. v. Hogan*, 539 F.3d 916, 924 (8th Cir. 2008), citing *United States v. Frazier*, 408 F.3d

1102, 1109 (8th Cir.2005), citing *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion). “The Fifth Amendment's protection applies only when the accused is compelled to make a testimonial communication that is incriminating.” *Id.*, citing *Barrett v. Acevedo*, 169 F.3d 1155, 1167 (8th Cir.1999) (emphasis in original), citing *Fisher v. United States*, 425 U.S. 391, 408 (1976). The privilege protects against compelled testimony; it does not protect the contents of preexisting or voluntarily prepared documents and records. See *United States v. Doe*, 465 U.S. 605, 611-12 (1976).

If served with a subpoena, Mr. Gustafson is free to assert his rights under the 5th Amendment as to testimony. He may still be required to produce documentary evidence. As noted by Chrysler, “[a]” blanket assertion of privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of questions.” *Morganroth v. Donovan*, 718 F.2d 161, 167 (6th Cir. 1983). A witness is not entitled to make a blanket assertion of the Fifth Amendment privilege as basis for quashing a subpoena. *Waldemar E. Alters Revocable Trust v. Mid-America Energy, Inc.*, 2008 WL 4544438, *5 (E.D. Ky. Oct. 10, 2008).

CONCLUSION

Gustafson’s motion is premature and misplaced. He should be made subject to the Bankruptcy Rule 2004 subpoena power. Upon examination, if the 5th Amendment is implicated, his rights are preserved as to testimony.

Gustafson's motion should be denied.



**LEONARD, O'BRIEN,
SPENCER, GALE & SAYRE LTD.**

/e/ Matthew R. Burton

Dated: March 8, 2010

By: _____
Matthew R. Burton, #210018
Attorneys for Trustee
100 South Fifth Street, Suite 2500
Minneapolis, MN 55402
(612) 332-1030

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JAMES C. GUSTAFSON		17-1 910 633 3334137887	5054
MAPLE GROVE, MN 55369-2656		Date <u>June 24, 2009</u>	
Pay to the Order of	<u>The Golf Club Scottsdale</u>		\$ <u>368⁷⁴/₁₀₀</u>
<u>Three hundred sixty eight and ⁷⁴/₁₀₀ 100ths</u>			
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Memo	<u>Hecker 067</u>		
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Account 000000000000000001
 Amount 368.74
 Post Date 20090708
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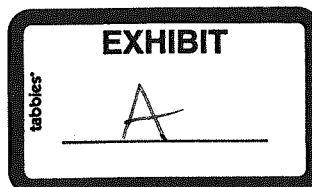
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For Deposit Only
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UNSWORN CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2010, I caused the following documents:

Trustee's Reply Memorandum

to be filed electronically with the Clerk of Court through ECF, and that the above documents will be delivered by automatic e-mail notification pursuant to ECF and this constitutes service or notice pursuant to Local Rule 9006-1(a).

I further certify that I caused a copy of the foregoing documents to be mailed by first-class mail, postage paid, to the following:

James Gustafson
c/o Steven J. Meshbesh, Esq.
Meshbesh & Associates PA
225 Lumber Exchange Building
10 South Fifth Street
Minneapolis, MN 55402

/e/ Stephanie Wood

Dated: March 8, 2010

Stephanie Wood
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Minneapolis, MN 55402
(612) 332-1030